FILED
FEB 7 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-639

In the

Supreme Court of the United States

DETROIT INTERNATIONAL BRIDGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL TAXPAYERS UNION, AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. The Constitution's "Just Compensation" Clause entitles an owner to be made whole when the government takes property for public use. The Declaration of Taking Act (40 U.S.C. § 3116) holds that where a property owner's receipt of compensation is delayed longer than a year, the owner is entitled to interest at only a statute-based percentage, which in this case is $38 million less than the amount that the Detroit Bridge's owners might have realized if they had received compensation at the time of the taking. Does the Act so interpreted violate the Just Compensation Clause?

2. May the decrease in property value resulting from the government's announcement that it intends to use eminent domain be a basis for a decreased just compensation award?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF), New England Legal Foundation (NELF) and National Taxpayers Union (NTU) respectfully submit this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by the counsel for all parties and lodged with the Clerk of the Court.

Pacific Legal Foundation was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation defending private property rights, economic freedom, and constitutional limitations. PLF litigates matters affecting the public interest at all levels of state and federal courts representing property owners before this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); and appearing as amicus curiae in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

New England Legal Foundation is a non-profit, public interest law firm whose membership consists of corporations, law firms, individuals, and others who believe in promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF has regularly appeared in state and federal courts, as party or counsel before this Court and other courts, in cases raising issues of general economic

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part. No person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo*, 545 U.S. 469, 125 S. Ct. 2655; *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005).

National Taxpayers Union is a nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and more accountability for elected officials at all levels. NTU's 350,000 members favor preserving the personal and property safeguards included in the United States Constitution and espouse the principle that private property rights are the foundation upon which a free society is built.

Because of their history and experience with regard to property rights in eminent domain, PLF, NTU, and NELF believe their perspective will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

This case presents the Court with essential questions about valuation under the Just Compensation Clause when property is taken through eminent domain. Given the nation's increased attention to issues related to condemnation since *Kelo*—which did not address the compensation element in eminent domain cases, 125 S. Ct. at 2668 n.21—and given the increasing use of eminent domain for economic development projects since *Kelo* was decided, this petition presents an important opportunity to answer questions of growing national import.

The petition should be granted for at least three reasons.

1. The decision below conflicts with holdings of this Court, as well as the First, Fifth, and Ninth Circuits, by holding that the Declaration of Taking Act imposes a maximum limit, rather than a minimum, on the interest to which a property

owner is entitled on a compensation award when payment is delayed.

2. The decision below conflicts with this Court's holdings as well as the holdings of several state courts, that the government may not use its own announcement of an intent to condemn property, or the effects such an announcement has on property values, to pay less for the land that it eventually condemns.

3. The use of government authority to diminish the value of property prior to condemnation is a serious abuse that has yet to be addressed by this Court. Given the broad authority to condemn valuable property recognized by *Kelo*, this problem must be addressed to stop further abuse of property owners.

ARGUMENT

I

THE SIXTH CIRCUIT'S HOLDING THAT THE DECLARATION OF TAKING ACT IMPOSES A CEILING ON COMPENSATION INTEREST CONFLICTS WITH DECISIONS BY THIS COURT AND OTHER CIRCUIT COURTS

The Declaration of Taking Act, 40 U.S.C. § 3116, provides a formula for determining the interest paid on "just compensation" when that compensation is delayed long after the taking of property.[2] The Sixth Circuit held that this formula

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[2] The original version of the Act, H.R. 14255, 71st Cong. (1931), provided that interest was to be calculated at the rate of 6%. *See id.* § 1. Congress tied the rate to the one-year Treasury bill in 1986, *see* H.R. 5363, 99th Cong. (1986), and set the Act's current language in 2000, *see* H.R. 4577, 106th Cong. (2000). That language was necessitated by the discontinuance of the fifty-two week Treasury bill. *See Liberty Square Development Trust v. City of Worcester*, 808 N.E.2d 245, 256 n.17 (Mass. 2004).

imposes a ceiling above which no federal court may go in awarding constitutionally required compensation. *United States v. Certain Land Situated in the City of Detroit*, 450 F.3d 205, 213 (6th Cir. 2006). Petitioner has shown how that holding conflicts with the holdings of several courts of appeals. *See* Pet. for Cert. at 11-14 (citing *United States v. Blankinship*, 543 F.2d 1272 (9th Cir. 1976); *United States v. 329.73 Acres of Land, Situated in Grenada & Yalobusha Counties, Miss.*, 704 F.2d 800 (5th Cir. 1983) (*en banc*); *United States v. 125.2 Acres of Land, More or Less, Situated in the Town & County of Nantucket, Mass.*, 732 F.2d 239 (1st Cir. 1984)).[3] But it is equally important to recognize that the decision below is also irreconcilable with this Court's jurisprudence on the requirements of the Just Compensation Clause. The general rule is that just compensation is the fair market value of the property taken as measured on the date of taking. *United States v. New River Collieries Co.*, 262 U.S. 341, 343 (1923); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). As a corollary, this Court has repeatedly held that just compensation also normally includes interest on the value of the taken property in cases where payment of compensation is delayed. *Id. See Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 299 U.S. 476, 496-97 (1937); *Jacobs v. United States*, 290 U.S. 13, 28 (1933); *Phelps v. United States*, 274 U.S. 341, 343-44 (1927); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123 (1924); and *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923).

Although the Act has influenced the provision of just compensation for decades, this Court has never addressed

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[3] State courts have also recognized that the determination of just compensation cannot be dictated by statutorily imposed interest rates. *See, e.g., Illinois State Toll Highway Auth. v. American Nat'l Bank & Trust Co. of Chicago*, 642 N.E.2d 1249, 1253 (Ill. 1994); *State by Humphrey v. Jim Lupient Oldsmobile Co.*, 509 N.W.2d 361, 363-64 (Minn. 1993).

whether it is constitutionally proper to view the Act as imposing a maximum limit on the rate of interest. *See Kirby Forest Indus.*, 467 U.S. at 11 n.16 (noting that United States had acquiesced in circuit courts' interpretation of original version of Act as imposing a floor, not a ceiling, to the rate of interest). Yet it has frequently stated that a bare failure to provide interest would violate the Just Compensation requirement. The Court has therefore interpreted statutes that are silent on the subject as including an interest requirement.

In *Seaboard Air Line*, for instance, the plaintiff sought compensation under the Lever Act, H.R. 4961, 65th Cong. (1917), for property requisitioned during the First World War. The Act did not expressly allow for the award of interest. The court of appeals had determined that silence to mean that the plaintiff was not entitled to interest. *United States v. Seaboard Air Line Ry. Co.*, 280 F. 349, 354 (4th Cir. 1922). This Court reversed. 261 U.S. at 306. Noting that the measuring and awarding of just compensation are "judicial function[s]," and that the owner of condemned property is entitled to be "put in as good position pecuniarily as he would have been if his property had not been taken," *id.* at 304, the Court concluded that "just compensation" comprehensively includes all elements of property's value. Thus the Act's silence with regard to interest did not mean that the owner could be deprived of the value of compensation for a long period of time without being compensated for that delay. A property owner is

> not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.

Id. at 306.

To the same effect is *Phelps*, 274 U.S. at 343-44, a case in which the Court held that the plaintiffs were entitled to interest on the use value of their dock leases in New York Harbor. Because the plaintiffs had the right to receive the "full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking," *id.* at 344, the compensation award would have to include interest "at a reasonable rate from the date of the use to the time of payment." *Id.* at 343.

Both *Seaboard Air Line* and *Phelps* predated the enactment of the Declaration of Taking Act, but this Court has reached the same conclusions since then. Indeed, in its more recent cases, this Court has made clear that the paramount consideration for assessing just compensation, and thus in determining the availability of interest, is the judicial identification of adequate compensation, not statutory qualifications. The *Jacobs* decision aptly illustrates this development.

In *Jacobs*, the petitioner sued for just compensation for the taking of an easement by flooding brought on by the government's construction of a dam. The court of appeals had determined that the petitioner was not entitled to interest because his claim arose under an implied contract, rather than the Fifth Amendment. *United States v. Jacobs*, 63 F.2d 326, 327 (5th Cir. 1933). This Court reversed, holding that the claim arose under the Fifth Amendment and emphasizing that the owner was entitled to "just compensation, not inadequate compensation." *Jacobs*, 290 U.S. at 16. Nowhere did the Court refer to the Act or its then-established six percent interest rate. Yet the Court interpreted *Seaboard Air Line* as holding "that the right to just compensation c[annot] be taken away by statute or be qualified by the omission of a provision for interest where such an allowance [i]s appropriate in order to make the compensation adequate." 290 U.S. at 17.

In *Shoshone Tribe*, the Court reaffirmed the implication in *Jacobs* that the right to adequate interest is an intrinsic aspect of the right to adequate compensation. There, the petitioner tribe sought compensation for the government's taking of its treaty rights through its reservation's occupation by Arapahoes. The tribe argued that because the Congressional enactment investing the Court of Claims with jurisdiction to hear the Shoshone Tribe's claims did not mention interest, such interest was not available. 299 U.S. at 484. The Court rejected that contention, concluding that the tribe's damages "include such additional amount beyond the value of its property rights when taken by the government as may be necessary to award of just compensation, the increment to be measured either by interest on the value" or by other appropriate means. *Id.* at 496. "[T]he right to interest," the Court concluded, "attaches itself automatically to the right to an award of damages." *Id.* at 497. Again, although the Court traced the tribe's right to interest to the government's obligation to pay just compensation, no mention was made of the Act.

Jacobs and *Shoshone Tribe* illustrate that the well-established proposition that Congress cannot dictate what shall constitute just compensation (because such a determination is a "judicial inquiry"), applies even in the context of disputes over interest. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). *Accord*, *Seaboard Air Line*, 261 U.S. at 304. As this Court stated in *New River Collieries Co.*, "The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be *or to prescribe any binding rule in that regard.*" 262 U.S. at 343-44 (emphasis added). Congress has no power to dictate to the federal judiciary what interest rate is to be applied in order to achieve the constitutionally mandated just compensation. Because the Sixth Circuit's decision below leads to a contrary

result, this Court should grant the petition to correct the lower court's error of law.

II

THE CONSEQUENCES OF THE GOVERNMENT'S ANNOUNCED INTENT TO USE EMINENT DOMAIN SHOULD NOT AFFECT THE AMOUNT OF "JUST COMPENSATION"

A. Mere Knowledge of a Pending Condemnation Cannot Deprive a Property Owner of Just Compensation

In the decision below, the court of appeals affirmed the district court's determination that the government's announced intention to take the subject property rendered the owners' development plans for the property untenable, and the value of those plans not compensable. *See Certain Land Situated in the City of Detroit*, 450 F.3d at 210. But this ruling runs counter to this Court's determination that the government's forewarning of a taking cannot be a basis for reducing its liability.

In *Palazzolo*, 533 U.S. 606, the Court held that a property owner's knowledge of the existence of a land use regulation prior to his acquisition of the property could not bar him from challenging the constitutionality of that regulation or seeking just compensation for it as a regulatory taking. *See id.* at 627 ("A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."). *Palazzolo*'s rejection of the "notice rule" was based on the unfairness of allowing government to evade its duty to compensate merely by announcing its intentions in advance. As Justice Scalia explained, the "notice rule" allowed government to obtain windfalls through its own actions:

> [T]here is nothing to be said for giving [this windfall] to the *government*—which not only did not lose something it owned, but is both the *cause* of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which *acted unlawfully*—indeed *unconstitutionally*.

Id. at 636-37 (Scalia, J., concurring). Although this case does not involve an *unconstitutional* taking, the issue is similar: if foreknowledge of the pendency of a taking can bar the property owner from obtaining the compensation to which he or she is entitled, the government can obtain value from a property owner—measurable in money—through its mere announcement of intention.

Courts have often found that the government's announcement of its intention to take property, coupled with other steps toward condemnation, can constitute a taking of property even in the absence of a formal condemnation. *See, e.g., Maxey v. Redevelopment Auth. of Racine*, 288 N.W.2d 794, 802 (Wis. 1980); *Althaus v. United States*, 7 Cl. Ct. 688, 696-97 (Cl. Ct. 1985). This is because the effect on property values caused by such an announcement can amount to seizing the value of a piece of property.

The decision of the court below inverts the established understanding by allowing the government to appropriate such value without compensation. If, as the district court held, the government's announcement of its intentions rendered the owners' plans "unreasonable," *United States v. Certain Land Situated in the City of Detroit*, 188 F. Supp. 2d 747, 759 (E.D. Mich. 2002), then the government's mere statement of intention could transfer value—namely, the value of those plans—from the owner to the government without compensation. This is particularly egregious, given that government is generally free

to change its mind with regard to a proposed condemnation after announcing its intention. *Matsuda v. City & County of Honolulu*, 378 F. Supp. 2d 1249 (D. Haw. 2005); *Hsiung v. City & County of Honolulu*, 378 F. Supp. 2d 1258 (D. Haw. 2005) (Contracts Clause does not bar government from refraining from the use of eminent domain).

Assuming the government's announcement of its plan to take property renders the property owners' plans impossible, this is a measure of the value of which the owners were *deprived*, and therefore of the compensation which the owners are *due*—not a measure of noncompensable or speculative value. As this Court noted in *Olson v. United States*, 292 U.S. 246, 256 (1934):

> The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. *Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use* in the public service.

(Emphasis added.)

B. This Case is an Important Opportunity for Ending Common Exploitation of Property Owners

Government naturally seeks to acquire property for the lowest possible price. But, unlike private market participants, it has the power to use coercive power to decrease the value of property targeted for condemnation. *See generally* Alan Romero, *Reducing Just Compensation for Anticipated Condemnations*, 21 J. Land Use & Envtl. L. 153 (2006). "Because of severe municipal budgetary restraints, coupled with heightened demands for increased public services and public

capital amenities, the temptation to engage in value-destroying gamesmanship confronts municipal offices around the country." William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 B.Y.U. L. Rev. 827, 829 (1993). Pre-condemnation depreciation allows the government to "solve" this problem by obtaining a windfall, and this Court has accordingly recognized that it is unjust to allow government to depreciate property values and then take advantage of this decrease by paying the lower value for the property. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961); *City of New York v. Sage*, 239 U.S. 57, 61 (1915).

Unfortunately, experience reveals that governments are routinely exploiting their authority to affect property values in just this way. The government's announcement of its plans to use eminent domain generally has an immediate effect on property values in a given area. *See, e.g., Wash. Mkt. Enters. v. City of Trenton*, 343 A.2d 408, 414-15 (N.J. 1975):

> From the time it becomes generally known that an area has been selected as the site of an urban renewal project . . . there ceases to be a ready market for premises within the area. It becomes difficult to find tenants and impossible to enter into long-term leases. Upkeep, maintenance and renovation cease; the value of the property tends constantly to diminish.

Investors are unlikely to purchase property that is targeted for condemnation—and other investors are unlikely to invest in places nearby, given their colleagues' reticence. In addition, once government gains control of property, it sometimes uses that property in ways that decrease the value of other property that the government seeks to condemn. Thus an entire neighborhood's property values will be affected in ways that allow government to acquire property it desires for below

market rates (or at least that make it difficult to determine the actual value of the property). Economic scholars such as Frank Michelman refer to these costs as "demoralization costs." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967). Allowing government to realize such windfalls unjustly imposes costs on particular property owners that ought in all fairness and justice to be borne by the taxpayers as a whole. *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795); *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

There are many reported instances of government using its authority in just this way. In *Kissinger v. City of Los Angeles*, 327 P.2d 10 (Cal. Ct. App. 1958), the court found that the city had rezoned the property owners' land as part of a concerted effort "to depress the value of the plaintiffs' property in order that it might be acquired for airport purposes." *Id.* at 16. This, the court found, violated the Due Process and Just Compensation Clauses. *Id.* at 15. *See also Maxey*, 288 N.W.2d at 801 (government denied business license as part of scheme to decrease property value for condemnation).

Other cases reveal even more startling examples. For example, in *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (6th Cir. 1968), the court found that the city's actions encouraged the deterioration of a neighborhood targeted for urban renewal. Among other things, the city condemned and demolished several properties, and then maintained *lis pendens* liens on properties during a delay of several years, which impaired the sales of property and reduced property values. Meanwhile, it told remaining property owners that their property was targeted for condemnation soon. *Id.* at 662. The court determined that government may not deprive property owners of the just compensation to which they are entitled by "commencing a condemnation action, prolonging it while they encourage deterioration of the area by filing a lis

pendens, tearing down some buildings, ordering welfare tenants to move, etcetera, and then abandoning it and commencing new proceedings at which awards are based solely on value at that time." *Id.* at 663.

More recently, in *City of Toledo v. Kim's Auto & Truck Serv., Inc.*, No. L-02-1318, 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003), *app. not allowed*, 804 N.E.2d 42 (Ohio 2004), *cert. denied* 125 S. Ct. 2988 (2005), property owners alleged that the city had consciously manipulated conditions in the surrounding area in order to maintain the presence of blight and permit a lower-cost acquisition of condemned property. *See* 2003 WL 22390102 at *2. The government condemned 29 structures, demolished 14 of them, and then failed to maintain the remaining 15. Vandals attacked the structures and other criminal activities reduced the neighborhood's property values. *Id.* Although the court determined that the area would have been blighted despite the government's malfeasance, the potential for abuse is obvious.[4] *See also Merkur Steel Supply, Inc. v. City of Detroit*, 680 N.W.2d 485, 494 (Mich. Ct. App. 2004), *app. denied* 688 N.W.2d 502 (Mich. 2004) (sufficient evidence supported claims that city had acted to diminish property owner's value so that city could acquire property for lower cost); *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977); *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 371 (E.D. Mich. 1970) (city's actions had decreased the value by "permitting the decay to progress."); *Amen v. City of Dearborn*, 718 F.2d 789, 795 (6th Cir. 1983) (city acquired property, then failed to maintain it, even posting signs on some vacant houses

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[4] In the project at issue in *Kelo*, city officials immediately tore down the many homes and other buildings that they acquired in the redevelopment project area. As a result, Kelo and other remaining property owners found themselves surrounded by vacant lots, and the value of the entire area accordingly decreased.

reading, "Free at your risk, take any part of the house. First come, first served. Hurry.").

As this list indicates, government is in a unique position to serve its own interests at the expense of property owners. Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 Real Est. L.J. 47, 60 (1998) ("cities have been known to withhold trash pickup and police protection from the targeted areas . . . . [or cause] the targeted properties to fall into disrepair, so that cities can acquire them cheaply. Or, zoning may be changed so as to lower property values in anticipation of condemnation."). Given the broad authority to condemn which was authorized by this Court in *Kelo*, cities now have even greater incentive to engage in such abusive practices. Courts and commentators have recognized that rigorously ensuring that property owners are awarded the fair amount of just compensation is the only practicable means of preventing the over-use of eminent domain. *See, e.g.*, Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 70-73 (1999); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 84 (1986).

Since this Court's decision in *Kelo*, incidents of condemnation of private property for economic development have increased dramatically. *See* Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in a Post-Kelo World* 2 (2006)[5] ("there were 5,429 threatened condemnations for private use in the past year, as compared to 6,560 in the five years between 1998 and 2002."). This dramatic increase reveals the need for this Court's review in a case involving important issues of compensation. This case is an important opportunity for the Court to clarify that the valuation of condemned property must be independent of considerations of

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[5] *Available at* http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (last viewed Feb. 1, 2007).

the government's own actions, and that government may not take advantage of its own condemnation decision to impose increased costs on those who are losing their property through condemnation.

CONCLUSION

The petition for a writ of certiorari should be *granted*.

DATED: February, 2007.

Respectfully submitted,

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